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Brief of Plaintiff in Error in Reply

Filed Jan. 20, 1898.

THE UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 194.

OCTOBER TERM, 1896.

No. 551.

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN DILWORTH JONES,
FRANCIS BACON JAMES,
Counsel for Plaintiff in Error.

JONES & JAMES, Attorneys.

(16,330.)

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THE UNITED STATES OF AMERICA:

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

HERMAN KECK, *Plaintiff in Error*, *vs.* THE UNITED STATES, *Defendant in Error.*	No. 194, Oct. Term, 1897. No. 551, Oct. Term, 1896. (16,330.)

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

MAY IT PLEASE THE COURT:

On the first argument of this case the learned Assistant Attorney General (*Mr. Whitney*) in open court abandoned the first count of the indictment, and stated that in view of its clear insufficiency counsel for plaintiff in error need not argue it. In view of this statement of the learned Assistant Attorney General, the revised brief on the re-argument does not very fully analyze the count. The present learned Assistant Attorney General (*Mr. Hoyt*) now brings forth a most exhaustive brief, in which he claims the sufficiency of the first count of the indictment. In reply we respectfully submit the following brief, to wit:

First count insufficient.

We will discuss the first count under three heads, to wit:

FIRST. The facts set forth in the first count of the indictment charge no crime.

SECOND. The omissions in the first count of the indictment cannot be supplied by a bill of particulars.

THIRD. The defects are not cured by section 1025 of the Revised Statutes of the United States.

I.

FIRST. *The facts set forth in the first count of the indictment charge no crime.*

The first count of the indictment is set forth at page 23 of our revised brief, and the statute on which it is based at pages 23 and 24.

Said count is defective in this:

(*a.*) *Diamonds are on the free list.* (Revised Brief, pp. 29–31.)

(*b.*) *If diamonds be not on the free list, as some diamonds are undoubtedly on the free list, the indictment should have fully, directly, and expressly named a kind of diamonds which are the subject of duty.* (Revised Brief, pp. 31–38.)

Every act is presumed to be lawful unless by allegations of *fact* it is charged to have been done under circumstances making it unlawful. In this case it is alleged that the defendant "imported * * * 563 diamonds * * * of the value of $10,000, contrary to law." It is urged by the learned Assistant Attorney General that the diamonds are identified by the prefix "563" and the suffix "of

the value of $10,000." But the prefix and suffix do not individuate the "diamonds." The prefix and suffix apply equally to *diamonds* mentioned in paragraph 467 of the act of August 27, 1894 (28 Stat., 509, 539), given at page 30 of the Revised Brief, which places certain kinds of diamonds on the free list, and as to which no crime can be committed. You can equally say "563" of "diamonds" on the free list as of diamonds on the dutiable list. You can equally say, "of the value of $10,000.00" of diamonds on the free list as of diamonds on the dutiable list. Words of number and value were in the indictments condemned in *Regina vs. Thomas Cox*, 1 Carrington & Kirwin, 494 (1844); Revised Brief, p. 33; and *State vs. Krider*, 78 N. C., 481 (1878); Revised Brief, p. 35. There are no words of description, no prefix or suffix, to the word "diamonds" which would signify a *kind* of diamonds mentioned in the dutiable list. Paragraph 467 is the only place the word diamonds *eo nomine* is mentioned in the tariff law of August 27, 1894 (28 Stat., 509, 539). Paragraph 338 (28 Stat., 509, 534), given at page 29 of the revised brief, provides for a duty on "precious stones." Cut precious stones not set are dutiable at 25 per cent.; uncut precious stones at 10 per cent.; cut precious stones, if set, at 25 per cent.; imitation precious stones, not set and not exceeding an inch in diameter, ten per centum.

In this indictment the word *diamond* is not individuated. It is not described as a precious stone or a diamond subject to any specific rate of duty, or by any of the various names by which diamonds or dutiable precious stones are known and which are referred to in the Revised Brief, page 32; nor is even the bare, naked, barren, legal conclusion inserted that they were subject to duty by law. (See remarks of *Mr. Justice Brewer*, at page 190, in *Dunbar vs. United States*, 156 U. S., 185, 190 (1895).)

It therefore follows that no words were inserted in the indictment describing a kind of diamond as to which a

crime could be committed, and these omitted words could not be supplied by inference, argument, or intendment, and therefore no crime was charged to have been committed.

In *Regina vs. Thomas Cox*, 1 Carrington & Kirwin, 494 (1844), Revised Brief, p. 33, an indictment for stealing "eggs" was condemned because there were some eggs the subject of larceny and some not, and the indictment omitted words describing eggs of a kind which were the subject of larceny. The indictment gave (as in the case at bar) the number of eggs as three and their value as two pence, but did not say *guinea* eggs, as the evidence showed them to have been.

In *State vs. Krider*, 78 N. C., 481, (1881), Revised Brief, p. 35, an indictment for stealing "fish" was condemned because there were some fish the subject of larceny and some not, and the indictment omitted words describing fish of a kind which were the subject of larceny. The indictment (as in the case at bar) gave the number of fish as five, and the report of the case showed that a value was stated in the indictment (page 481).

In *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878;) Revised Brief, pp. 44–45, 49, *Mr. Chief Justice Gray* condemned an indictment, charging the adulteration of "confectionery." The quantity (as in the case at bar) was described as one pound, and its quality as for food. (See cases and text books cited.)

In *United States vs. Cruikshank*, 92 U. S., 542 (1875), S. C. Beale's Cases on Criminal Law, 28 (Revised Brief, pp. 35–37), *Mr. Chief Justice Waite* held bad an indictment that charged the defendant with depriving persons of their "rights." He held that a specific right should have been alleged, so that the court might determine from the *facts* alleged whether a crime was charged.

In *United States vs. Morrissey*, 32 Fed. Rep., 147 (1887), Revised Brief, pp. 41, 42, the indictment described acts equally applicable to a State or Federal election, and as the

indictment did not positively point to a vote received for a Congressman, *Mr. Circuit Judge Brewer* held it bad. (See this case analyzed, Revised Brief, pp. 41, 42.) The same conclusions in a similar case were reached by *Mr. Justice Harlan* in *Blitz vs. United States*, 153 U. S., 308, 315 (1894); Revised Brief, pp. 55, 56.

In *Moore vs. United States*, 160 U. S., 268, 274, 276 (1895), it is held by *Mr. Justice Brown* that an indictment for embezzlement was bad which charged that defendant "did embezzle the sum of $1,652.59, money of the United States, of the value, etc., said money being the personal property of the United States."

An indictment must on its face, by allegations of *fact*, show that a crime was committed. *Mr. Chief Justice Waite* in *United States vs. Cruikshank*, 92 U. S., 542, 556, 558 (1875); *Mr. Justice Gray* in *United States vs. Carll*, 105 U. S., 611, 612, 613 (1881); *Mr. Justice Woods* in *United States vs. Britton*, 107 U. S., 665, 669 (1882); *Mr. Justice Field* in *United States vs. Hess*, 124 U. S., 483, 486, 487, 488 (1888), and *Mr. Justice Brown* in *Moore vs. United States*, 160 U. S., 268, 270 (1895).

If every kind of diamond were dutiable and there were no kind of diamond on the free list, a different question might possibly be presented, because then to say "diamond" would mean a dutiable article.

The fallacy of the argument of the learned Assistant Attorney General consists in assuming the very point at issue, namely, that the first count of the indictment charges a crime, and, having assumed that a crime is charged, he argues that, the count being indefinite, the remedy was other than by demurrer.

(c.) *This count violates article VI of the Amendments to the Constitution of the United States.*

The accused has the constitutional right to be informed of the nature and cause of the accusation under article VI,

amendments to the Constitution of the United States. In *United States vs. Cruikshank*, 92 U. S., 542 (1875), an indictment charging defendant with depriving certain persons of their "rights" was held to violate this constitutional provision. In *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878), an indictment which charged the adulteration of "confectionery" was also held to violate the constitution of Massachusetts, which contains a provision similar to article VI of the amendments to the Constitution of the United States. The court is also referred to *Commonwealth vs. McCance*, 164 Mass., 162 (1895); *People vs. Cox*, 40 Cal., 275 (1870); 1 Bishop New Criminal Procedure (4th ed., 1895), sections 98*a*, 100*a*, 101, 108, and 111, and to Revised Brief, pp. 36, 37, and 49.

(*d.*) *This count of the indictment does not allege what law the importation was contrary to.*

We have already discussed this question in our Revised Brief, pp. 23–26.

The argument of the learned Assistant Attorney General is fully answered by *Mr. Chief Justice Waite* in a part of his opinion in *United States vs. Cruikshank*, 92 U. S., 542, 557, quoted in the Government's Brief, pp. 10, 11.

It is suggested by the learned Assistant Attorney General (his Brief, pp. 7–9) that section 3082, Revised Statutes, was intended to cover smuggling. While section 3082 constituted section 4 of the act of July 14, 1866 (14 Stat., 179), that statute contained some 44 sections, and was entitled "An act to further prevent smuggling and other purposes." As the language of the section is clear and unambiguous, there is no necessity to resort to the title of the act. Its meaning is plain, and it is a condition precedent to a right to resort to the title that an ambiguity exist. Even if we resort to the title, and even if we concede that section 3082 was intended to include the crime of

smuggling, punished by section 2865, Revised Statutes, the position of the learned Assistant Attorney General is not sustained. On the contrary, it destroys his position, because to constitute the crime of smuggling under section 2865, Revised Statutes, eight (8) elements must co-exist (which we have heretofore set out in the Revised Brief, pp. 65, 66). This count is signally wanting, in that it omits the first, third, fourth, fifth, sixth, and eighth of these elements. It omits more than it inserts. This count of the indictment does not allege even by a bare, naked, and barren conclusion that the diamonds were subject to duty, or that the duty was not paid, or that they should have been invoiced, or that the invoice was omitted, or that any act was done with intent to defraud the *revenue* of the United States. There is a bare allegation to defraud the United States, but there are other ways to defraud the United States than of its revenue.

It is next contended (Brief, p. 8) that there might be other laws, and that "contrary to law" might apply to sections 2809 and 2814, Revised Statutes; but there are no allegations in the indictment that the defendant was the master of a vessel, or other allegations of fact. These sections provide distinct penalties for the acts and omissions which they punish.

(e.) *The rulings in the cases cited have not been overruled by the Dunbar Case.*

In the Revised Brief, p. 24, a number of cases have been cited wherein similar indictments were condemned. The learned Assistant Attorney General reviews them in his brief, but nowhere attempts to distinguish them. He ends up at page 10 with a sweeping statement that they are overruled by the *Dunbar* case. An examination of the nine counts of the indictment set forth in the report of the case of *Dunbar vs. United States*, 156 U. S., 185 (1895), drawn under section 3082 of the Revised Statutes, shows that they are

drawn with great particularity, setting forth all of the elements, and not a mere statement of conclusions and barren of facts, as is the first count of this indictment. Instead of militating against our position, the *precedent* of the indictment in the *Dunbar Case* sustains us.

(*f.*) *The facts in the Dunbar Case are clearly distinguishable from the case at bar.*

We have already pointed out in the Revised Brief, pp. 38–40, the distinction between the case of *Dunbar vs. United States*, 156 U. S., 185 (1895), and it is unnecessary to repeat the arguments there made.

(*g.*) *An indictment is not good unless the facts constituting the crime are set forth accurately, fully, and clearly, without uncertainty and ambiguity.*

Laws creating crimes must be explicit, so that all men may know what acts to avoid; *and an indictment must directly set forth facts bringing the accused plainly and unmistakably within the statute. United States vs. Brewer*, 139 U. S., 278, 288, (1891). The indictment must, by allegation of *fact*, set forth all the elements of the offense, without any ambiguity or uncertainty, and not by conjecture, inference, or implication. (See cases cited, Revised Brief, pp. 33–38, 52–56.) This count of the indictment clearly violates all of these rules.

II.

THIS COUNT CANNOT BE HELPED BY A BILL OF PARTICULARS.

It is earnestly contended by the learned Assistant Attorney General (in his Brief, pp. 17–22) that the remedy of the defendant was by bill of particulars. The only cases where a defendant is driven to a bill of particulars is where the

indictment states a crime. The learned Assistant Attorney General assumes as the premises of all of his arguments that the indictment does state the crime. As the premises is fallacious, his conclusions necessarily fail.

Article V of the amendments to the Constitution of the United States provides that no person shall be held to answer a capital or otherwise infamous crime except upon the *indictment of a grand jury.*

Article VI provides that the indictment shall inform the defendant of the nature and cause of the accusation. This has been construed by the Supreme Court of the United States in *United States vs. Cruikshank*, 92 U. S., 542, 557, 558 (1875), and by the supreme court of Massachusetts in *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878), where similarly drawn indictments were held not to state crimes because in violation of these constitutional limitations.

It is stated with great force in 1 Bishop New Criminal Procedure (4th ed., 1895), that—

"SEC. 646. *The bill of particulars not being made by the grand jury on oath cannot supply any defect in the indictment.*

"Nor in reason should the court suffer any otherwise insufficient allegation to pass on the ground that it has power to order *particulars* from a person not of the grand jury."

The same writer, at section 643, lays it down that the defendant is only driven to a bill of particulars *when an indictment cannot be pronounced ill by the court.*

In the case of *Ex parte* Bain, 121 U. S., 1 (1886), the trial court struck a line from the indictment as surplusage, and the Supreme Court of the United States liberated the defendant upon the ground that the court had lost jurisdiction, because the indictment with the line stricken out was "indictment by district attorney" and not "indictment by grand jury." The opinion of the learned justice who delivered the opinion of the court fully refutes the position of the learned Assistant

Attorney General. The position of the learned Assistant Attorney General amounts to this, that this indictment, which omits a matter of substance and states no crime, could have been turned into a good indictment by the district attorney if the defendant had asked for six things, to wit: *first*, by asking what kind of diamonds they were; *second*, whether they were precious stones; *third*, whether they were subject to duty; *fourth*, what rate of duty; *fifth*, what law the alleged importation was contrary to; and, *sixth*, in what respect it was intended to defraud the United States. In other words, under the guise of a bill of particulars, he would have the defendant reindicted by an indictment in effect drawn by the district attorney, while the Constitution guarantees that no person shall answer a capital or otherwise infamous crime except upon indictment by a grand jury.

This contention would in effect abolish indictment by grand jury. *Ex parte Bain*, 121 U. S., 1 (1886); 1 Bishop, New Criminal Procedure (4th ed., 1895), sec. 643 and would overrule the cases of *Commonwealth vs. Chase*, 125 Mass., 202 (1878), and *United States vs. Cruikshank*, 92 U. S., 542 (1875), which has been cited, affirmed, and quoted with approval in *United States vs. Carll*, 105 U. S., 611, 612, 613 (1881); *United States vs. Hess*, 124 U. S., 483, 485, 486, 487 (1888), and *Moore vs. United States*, 160 U. S., 268, 274, 276 (1895).

The court is also referred to our Revised Brief, pages 42–45, where the subject of "Bill of Particulars" is also discussed.

Some cases are referred to in the Government's brief (pp. 19–22) where bills of particulars were permitted. It will be found in those cases that a reason is given for not entering into minute details, and that reason was that the matters omitted were too indecent to be spread upon the records of the court. In those cases where indictments omitting matter were sustained a reason was always given, either that the matter was too indecent to spread upon the records of

the court, as in *Durland vs. United States*, 161 U. S., 306; *Rosen vs. United States*, 161 U. S., 29, or that the names and addresses were unknown to the grand jury, as in the *Durland case;* or that the details were to the grand jury unknown *People vs. Bogart*, 36 Cal., 245 (1868). *United States vs. Claflin*, 13 Blatch., 178, 181 (1875). In *Dunbar vs. United States*, 156 U. S., 185 (1895), which we have discussed in our Revised Brief, pages 38–40 and page 45, the court suggested that *perhaps* a bill of particulars might have been asked for, but *Mr. Justice Brewer* only makes the suggestion *after showing that the indictment without a bill of particulars stated a crime.*

III.

THE DEFECTS ARE NOT CURED BY SECTION 1025 OF THE REVISED STATUTES.

We have already discussed section 1025 of the Revised Statutes in our Revised Brief, pp. 40–42, and that argument will not be repeated. In addition to the cases there cited we wish to refer to the following cases, where contentions similar to the present ones made by the learned Assistant Attorney General were disallowed by this court, to wit: *United States vs. Cruikshank*, 92 U. S., 542, 544–545, 546, 548-549, 557–559 (1875); *United States vs. Carll*, 105 U. S., 611, 612, 613 (1881); *United States vs. Hess*, 124 U. S., 483, 485, 486, 487, and *Moore vs. United States*, 160 U. S., 268, 274, 276 (1895).

There is nothing peculiar to the crime of smuggling, as elaborately argued by the learned Assistant Attorney General, which would cause a rule to be applied to it in any way different from the crimes of murder, embezzlement, larceny, etc.

First count of indictment—no proper conviction under it.

(*a.*) The first count of the indictment was duly demurred to as being insufficient in substance (Revised Brief, pp. 23–26), and being thus fatally defective, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the court. (*Moore vs. United States*, 160 U. S., 268 (1895).)

(*b.*) It is next contended by the learned Assistant Attorney General (his Brief, pp. 22, 23) that the first count of the indictment, based on section 3082, Revised Statutes, is the same as the crime under section 2865, Revised Statutes. We have in our Revised Brief presented this question in three parts: *First*, that the facts do not constitute smuggling or clandestinely introducing (Revised Brief, pp. 65–82); *second*, that an attempt to smuggle or clandestinely introduce is not alleged (Revised Brief, pp. 82, 83); *third*, that if an attempt to smuggle has been properly alleged, the facts do not make out a case of an attempt (Revised Brief, pp 83–90). As we have stated, the word "smuggle" has a well-defined technical meaning (Revised Brief, pp. 49, 50, 66, and 71). It is a settled rule of interpretation that where a word has a well-defined technical meaning, that when said word is contained in a statute it shall be given that technical meaning (Revised Brief, p. 66). We have shown that the definition contained in the anti-moiety act does not apply except to that act (Revised Brief, pp. 71, 72), and, even if it did, a crime is not established by the evidence (Revised Brief, pp. 83–90). The court's especial attention was called to this matter by the request for special instruction number 5, set forth in the Revised Brief, pp. 85, 86.

The record discloses no possession by the defendant. According to the testimony of Captain Loesewitz, the package was handed to him by Mr. Von Hemmerick and was never in the possession of Mr. Keck.

The Second Count of the Indictment.

We have shown in the Revised Brief, pp. 26–59, that the second count of the indictment is insufficient. We have also shown by that the *Dunbar case* is clearly distinguishable. (Revised Brief, pp. 38–40.)

It is suggested in the Government's Brief (pp. 28, 29) that when Captain Loesewitz handed Revenue Officer Gallen the package that that was an overt act. In this he is mistaken, because, according to the testimony of Mr. Gallen (Record, p. 44), at the time Captain Loesewitz turned the package over to Mr. Gallen he knew him to be a Treasury Department agent. Therefore there was not at that time any overt act to take them ashore, but a submission of them to the revenue agent (Revised Brief, pp. 86, 87). In addition, the court charged the jury upon the hypothesis of the belief in the story told by Captain Loesewitz (Revised Brief, pp. 124–133), and in its response to request number 10 for special instructions, confined the inquiry to the smuggling charged, as testified to by Captain Loesewitz. (Revised Brief, pp. 134–136.)

IN CONCLUSION.

The other points referred to in the Government's brief are fully dwelt upon in the Revised Brief, and for convenience of reference the court is referred to the "Index to Brief" and the "Epitome of Brief" contained between pages I–XII, in our Revised Brief.

That "clandestinely introducing" is not sufficient (bottom page 51, Revised Brief); see also *Britton vs. United States*, 107 U. S., 665, 669.

Respectfully submitted.

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JANUARY 19, 1898.